

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

JOHN CROISANT, Executor of the
Estate of Arthur T. Croisant,
Plaintiff,

vs.

THRIVENT INVESTMENT
MANAGEMENT, INC.

Defendant.

Case No. 04-4023-JAR

ORDER GRANTING MOTION TO DISMISS COUNT IV

This matter comes before the Court on defendant's Motion to Dismiss Count IV (Doc. 24). Because Count IV fails to plead a violation of the Kansas Securities Act with the particularity required for a claim of fraud, the Court grants the motion to dismiss Count IV.

Count IV of the Amended Complaint alleges a violation of the Kansas Securities Act,¹ summarily stating “[b]y omitting to state material facts and by making untrue statements in the statements made by defendant and its agent to Arthur Croisant and John Croisant about the Variable Annuity, defendant violated the Kansas Securities Act...” Although Count IV incorporates by reference paragraphs 1-30 of the Amended Complaint, none of those paragraphs describes or details the material

¹K.S.A. 17-1251 et seq.

facts allegedly omitted, nor the substance of the allegedly untrue statements.

Count IV does not satisfy Fed. R. Civ. P. 9(b), which requires that “[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other conditions of mind of a person may be averred generally.” Allegations of fraud must “set forth the time, place, contents of the false representation, and the identity of the party making the false statements and the consequences thereof.”² The purpose of Rule 9(b) is “to afford defendant fair notice of plaintiff’s claims and the factual ground upon which [they] are based...”

Violations of the Kansas Securities Act, for making false statements or misrepresentation, are subject to the Rule 9(b) heightened standard for fraud claims.³ Lacking any such detail or specificity, Count IV fails to give the defendant fair notice of plaintiff’s claim and the factual grounds underlying it, and should be dismissed.

Defendant argues a second ground for dismissal, one not subject to cure by an amended complaint. Defendant argues that Count IV fails to state a claim because the variable annuity that is the basis for this complaint, is not a “security” as defined by the Kansas Securities Act. Indeed, the act defines “security” as *not* including “...any insurance or endowment policy or annuity contract under which an insurance company promises to pay money either in a lump sum or periodically for life or some other specified period.”⁴

² *Koch v. Koch Industries, Inc.*, 203 F.3d 1202, 1236 (10th Cir. 2000) (citing *Lawrence Nat’l Bank v. Edmonds (In re Edmonds)*, 924 F.2d 176, 180 (10th Cir. 1991)).

³ *Sheldon v. Vermonty*, 31 F. Supp. 2d 1287, 1294 (D. Kan. 1998) (state law claim under Kansas Securities Act must satisfy pleading standard of Rule 9(b), citing *Seattle-First Nat’l Bank v. Carlstedt*, 800 F.2d 1008, 1010 (10th Cir. 1986)). See also *Grossman v. Novell, Inc.*, 909 F. Supp. 845, 851 (D. Utah 1995), *aff’d*, 120 F.3d 1112 (10th Cir. 1997).

⁴ K.S.A. 17-1252(j).

The parties argue about the nature of an amendment to the Kansas Securities Act, and whether it effected a change in the scope of the existing law to cover variable payments under an annuity contract. Plaintiff argues that defendant failed to provide adequate authority or briefing of this issue, but from the Court's perspective neither party did. Accordingly, the Court will deny this ground for dismissal at this time.

IT IS THEREFORE ORDERED BY THE COURT that defendant's Motion to Dismiss Count IV of the Complaint (Doc. 24) shall be GRANTED.

IT IS SO ORDERED.

Dated this 31st day of August, 2004.

S/ Julie A. Robinson
JULIE A. ROBINSON
UNITED STATES DISTRICT JUDGE